HISTORY AND THEORY OF INTERNATIONAL LAW

FORMAT: Seminar

CLASS MEETS: Mondays 4.05pm-5.55pm, Furman Hall 316

CREDITS: Two (2). (Three (3) credits if, with permission of instructor, the “Extra Credit” option is selected and the paper requirements are met according to the timetable and arrangements specified below.)

INSTRUCTOR: Prof Benedict Kingsbury, VH-314D, email benedict.kingsbury@nyu.edu. Office hours: Mondays 2pm-4pm, or by appointment made with Ana Lara. Assistant is Ana Lara, first desk on left inside VH-314, laraa@juris.law.nyu.edu.

ASSESSMENT OF WRITTEN WORK: Students have a choice of (a) writing a substantial research paper (two-credit, typically 20-30 pages, or three-credit, typically 30-40 pages); or (b) taking the exam (two credits). The exam format will be discussed in class -- it will be a 24-hour take-home exam available (if practicable) throughout the Law School’s examination period.

ATTENDANCE AND PARTICIPATION: All students are required to attend class regularly, to do the reading before class, and to participate actively. This includes making 2-3 class presentations of specific course materials (typically 5-6 mins, making an argument about the materials or themes they raise, not summarizing them - it is often helpful to distribute a presentation outline to attendees.) Participation will be weighed in the final grade. No credit for the course will be awarded to anyone who is present for less than 80% of the class time.

REQUIREMENTS FOR THOSE WRITING PAPERS: For those writing a standard (2-credit) paper, a one-page synopsis of a research topic is due Friday October 28, and the final paper is due by 12 noon on Friday December 23. For those writing a 3-credit paper (including LLM, JSD and PhD students as well as JD students writing “A” papers), a preliminary indication of the topic should be provided by Friday October 14, a well-developed outline is due Friday November 4, a full first draft is due Thursday December 8 for comments, and the final paper is due by 12 noon on Tuesday January 17, 2006. These dates are not flexible. Late papers will receive lower grades (absent special medical circumstances etc.) Those intending to write 3-credit papers must meet the specified due dates for the full draft and the final paper to receive three credits. Final papers must be turned in by email to benedict.kingsbury@nyu.edu, and laraa@juris.law.nyu.edu.

COURSE MATERIALS: There is one required text, available from the Professional Bookstore: Richard Tuck, The Rights of War and Peace: Political Thought and International Order from Grotius to Kant (Oxford University Press, 1999). Other course materials will be distributed in photocopied form or made available in the library.

PROVISIONAL OUTLINE
Wednesday 7 September (this is a legislative Monday in the Law School schedule):

1. Introduction and Overview

Anthony Carty, Distance and Contemporaneity in Exploring the Practice of States: The British Archives in Relation to the 1957 Oman and Muscat Incident, (2005) 9 Singapore Year Book of International Law, pp. 1-11
Richard Tuck, The Rights of War and Peace, pp. 1-15

Discussion Questions:

1. Is history relevant to the ways in which we now conceive of international law and of its core problems? If international law had no history before 1945, would things be any different? How might much older intellectual approaches, and paths taken and not taken long ago, be shaping the way we think now? Consider, for instance, the meaning of the idea of the state -- where did this come from, and is this now the same idea across the globe? How has history shaped views as to whether the state or the individual is the basic unit of international law? How might the history of European colonialism -- with its justifications and attempts at its delegitimation -- affect modern international law?

2. What different strategies are possible to reconcile the aspirations of international law with a world dominated by powerful states and characterized by gross inequalities? How do different people choose which of these strategies to pursue? Do the choices people make vary across history according to the dominant political theory of the times, or the existing distribution of power? How do international lawyers analyze these choices, including when evaluating ‘state practice’? Is Michael Reisman right in implying that international law should acknowledge that the United States has special responsibilities, and also a special freedom of action, that most or perhaps all other states do not have?

3. Should we understand the structure of international law as amounting to an International Legal System? Why does David Kennedy argue that we should instead see international law as being People with Projects? To what extent should we understand international law as part of a world of our own making rather than a world that just is?
Monday 12 September:

2. Scholastic and Humanist Foundations: Vitoria (c. 1486-1546) and Gentili (1552-1608)


Discussion Questions:

1. What distinctions can be drawn between the kinds of arguments made about war and colonialism by the Spanish Catholic (Thomist) Vitoria and those made by the Italo-English Protestant (Lutheran) Gentili? Are these connected with differences in their views about the nature of international society? What place does each of these writers see for war in international society?

2. The Japanese scholar Yasuaki Onuma makes an argument that seems to uphold in the 21st century the focusing of attention of historians of international law on the history of ideas in just one small region. Is he right?

3. Indian political theorist Sudipta Kaviraj provides a rich account of traditions (by no means all autochthonous) of thought about society and the state in India. He contrasts Gandhi’s argument for a relatively limited state with Nehru’s modernist project, and notes that the meaning and embodiment of the state in Indian public thought remains distinctive. What are the implications of this account for Onuma’s approach, and for contemporary international law?

Monday 19 September:

3. Grotius (1583-1645)

Hugo Grotius, Mare Liberum (The Free Sea) (1609) (transl Richard Hakluyt; David Armitage ed, 2004, excerpt) Peter Borschberg, Hugo Grotius, East India Trade and the King of Johor (1999) 30 Journal of Southeast Asian Studies 225-48 *Hugo Grotius, De Jure Belli ac Pacis (The Law of War and Peace) (1625), Prolegomena and Book I, chaps 1 and 2; Book II, ch. 20, sections 40-44.4 and 47.5-51; and Book II, ch. 21, sections 1-4.2 Richard Tuck, The Rights of War and Peace, pp. 78-108 Edward Keene, Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics (2002), pp. 40-59
Discussion Questions:

1. What is the relation between Grotius' work on freedom of the seas and his writing on other topics in *De Jure Belli ac Pacis*? Is the former driven by practice and the latter by theoretical commitments? Does reading these works in the light of governmental and commercial practices produce different interpretations than reading them simply as contributions to the history of ideas - if so, how should they be read?

2. What is Grotius' concept of international society? What is the place of war in it? Is Tuck right in suggesting that much of the structure of Grotius' thought was influenced by the need to respond to the skeptical argument that practices in different societies vary so much that natural law cannot exist? If so, what has been the influence of this problem on the development of international law (e.g. human rights law), and has the problem been overcome?

Monday 26 September:

4. The ‘Grotian Tradition’ in International Relations and International Law

Tadashi Tanaka, Grotius's Concept of Law, in Yasuaki Onuma (ed), A Normative Approach to War (1993), pp. 32-56; and excerpt from Onuma, Conclusion, same volume, pp. 340-5
Edward Keene, Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics (2002), pp. 12-39

Discussion Questions:

1. Is Hedley Bull right to identify and espouse a Grotian tradition of international law and of theorizing about international relations? Is it helpful to think about the history of international law in terms of the interplay between contending traditions?

2. Is Edward Keene justified in his explication of the specific origins and limitations of the English School approaches to Grotius and to world order? What are the implications of his assessment?

3. What is Grotius' concept of law? Does he have a concept of international law in any recognizable modern sense? What concepts does he have of (subjective) rights and duties?
Monday 3 October:

5. Hobbes (1588-1679) and the Hobbesian Tradition

*Thomas Hobbes, Leviathan (1651), **chs 13-14, chs 15-16 + ch. 26
James Gordley, The Philosophical Origins of Modern Contract Law (1991), pp. 112-33
*Carl Schmitt, Politische Theologie (Political Theology) (2nd edn, 1934), Preface + chs 1-2
(also, as background, Foreword by Thomas McCarthy and Introduction by George Schwab)
Pascale Pasquino, Political Theory of War and Peace: Foucault and the History of Modern Political Theory, (1993) 22 Economy and Society, pp. 77-88
Quentin Skinner, How We Acquired the Concept of the State (and What Concept(s) We Acquired) (MS, 2005)

Discussion Questions:

1. What is Hobbes' theory of law? What is his theory of international law? Is his view of international relations as a war of all against all fatal to any possibility of real international law, or are there roles for law even in this Hobbesian world? Does it matter how power is distributed between states e.g. might law have a greater role if there exists a stable balance of power amongst several major states?

2. What are the differences between Hobbes and Grotius? (Gordley argues that Hobbes and Locke represent a decisive break from Aristotelian metaphysics, whereas Grotius was still in fact imbued with the Aristotelian system. Tuck, however, argues that Hobbes is the culmination of the humanist tradition to which Grotius also belonged, and that Hobbes' view of the state of nature is not radically different from that of Grotius.) In the next class we will consider whether Pufendorf represents a real and better alternative, as many in the 17th and 18th centuries thought.

3. What is Hobbes's concept of the state? Is Skinner right about the fundamental lack of agreement on the meaning of the state in North Atlantic traditions; and about the consequences of using the same term ('the state') to mean such different things? What are the implications for international law?

4. 'Sovereign is he who decides on the exception' writes Carl Schmitt at the very beginning of Political Theology. What does this imply for the possibility of law? Is this view an inevitable continuation of Hobbes' theory? Are there ways to avoid it? Does it lead to concentration camps and the holocaust?
Monday 10 October:

6. Pufendorf (1632-1694) and the Naturalist Tradition of Human Sociability

*Samuel Pufendorf, De Officio Hominis et Civis (On the Duty of Man and Citizen) (1673), Book II, chs 1-6, 12, and 16-17
Samuel Pufendorf, De Jure Naturae et Gentium (The Law of Nature and of Nations) (1672), Book I, ch 1 & ch. 6; Book II, ch. 3; Book III, ch. 3, ss. 9-10; Book IV, ch. 5, ss. 6-10.
*Richard Tuck, The Rights of War and Peace, pp. 140-165
[Note: of interest for those wishing to read further on Pufendorf, is Hans Blom and Laurens Winkel, Grotius and the Stoa (2004); this book includes papers on Pufendorf by Fiametta Palladini and Kari Saastamoinen, and also a paper by Laurence Dickey on free trade, sociability and universal benevolence in Anglophone and French eighteenth-century thinking.]

Discussion Questions:

1. Hont (pp. 274-5) points out that Pufendorf’s jurisprudence was constructed around the concept of commercial sociability, which is capable of creating ‘society’ without the participants in international commerce uniting under the same government and constitution. Tuck argues (pp. 164-5) that Pufendorf provided the foundation to reject an aggressive and interventionary foreign policy as the immoral outcome of competition between commercial nations. Does commerce create international society? Does commerce promote peace or bellicosity?

2. What is the importance of a theory of human sociability to a theory of international law? Is human sociability just another way of describing self-interest? Is it possible to have any far-reaching theory of international law that does not depend on a strong notion of an obligation of mutual aid?

3. Pufendorf’s concept of law is remarkable in stressing the ‘internal aspect’ of law, i.e. the difference between acting through fear (as a result of actual or potential coercion) and acting through an inner sense of obligation (De Jure Naturae et Gentium, Book I, ch. 6, s.s 5 -- in course materials.) His concept of international law is one of natural law, not grounded directly in customary practice or even treaties. But who bears an inner sense of obligation with regard to international law, and why?

4. Pufendorf made use of an important distinction between state and society. How do ideas of civil society, including transnational civil society, and of sovereignty fit together in the traditions of thought that flow from Pufendorf’s work? Is Elshtain right in pointing to fundamental similarities in conceptions of God, Sovereign, and Self (Paterfamilias) in the work of writers like
Pufendorf? Does this suggest that different views of the Self are necessary if different views of Sovereignty are to prevail?

5. Are any of the models of state formation in the writings of the theorists we have looked at so far really applicable all over the world? What is the relation between Pufendorf’s account of how and why states form and current experience in attempts to re-establish a state in Somalia?

**Friday 14 October, 2-4pm:** *(make-up class, replacing one class session near end of semester)*

7. **International Law as Practice: Vattel (1714-67) and Pluralist Empiricism**

Emmerich de Vattel, *Le Droit des Gens* (The Law of Nations) (1758), *Preface by Vattel, Preliminaries, Book I, Chs 1-3 (ss. 1-37), Book I, Chs 6-8 (ss. 72-99), Book II, Chs 1-2 (ss. 1-34), Book II, Chs 4-5 (ss. 49-70)

Richard Tuck, The Rights of War and Peace, pp. 184-96


Andrew Hurrell, Vattel and the Limits of Pluralism, in Ian Clark and Iver Neumann eds., Classical Theories of International Relations (1996)

**Discussion Questions:**

1. Does pluralism provide a viable theoretical basis for international law? What are its limits?

2. Writing immediately after the cataclysm of World War I, the Dutch writer Cornelis Van Vollenhoven accused Vattel of having diverted international law from Grotius’ noble vision into an apologist's manual for the diplomatic practice of states. Is there any substance to this charge against Vattel? Why might the biting criticism of Grotius by late-18th century writers such as Rousseau and Kant have given way to enthusiasm for Grotius among 20th century writers such as Vollenhoven (1919 et seq) and Hersch Lauterpacht (1946)?

3. Richard Tuck argues that a German authoritarian view of the state marched in parallel with a non-interventionist approach to international affairs, whereas liberal advocacy of constraints on the state's powers within the polity has often corresponded with advocacy of international interventionism. Tim Hochstrasser positions Vattel between Barbeyrac’s liberalism and Wolff’s embrace of the authority of the state. Do these views help us understand Vattel?

4. Tim Hochstrasser suggests (p. 179) that Vattel rejected Wolff’s ‘older world view where the Holy Roman empire remained a living part of the political debate’ because Vattel was part of ‘an era of sovereign states that quite clearly were independent and free standing.’ This is a standard view - but is it right?
Monday 17 October:

8. Alberico Gentili Reconsidered *Guest speaker: Dr Diego Panizza, University of Padua*

*Diego Panizza, Political Theory and Jurisprudence in Gentili’s De Iure Belli (manuscript, available early October)*
Additional materials on Gentili

Monday 24 October:

9. The Problem of War: Rousseau (1712-78) and Kant (1724-1804)

Immanuel Kant, Idea for a Universal History with a Cosmopolitan Purpose (1784), *Perpetual Peace* (1795), and excerpts from Metaphysik der Sitten (The Metaphysics of Morals) (1797), all in Hans Reiss ed., Kant's Political Writings (2nd edn, CUP, 1990), pp. 41-53, *91-130, 131-75.*
*Richard Tuck, The Rights of War and Peace, pp. 207-225*
Kenneth Waltz, Man, The State and War (1954), pp. 159-86

Discussion Questions:

1. Did Rousseau transform the idea of war from conflict between peoples into conflict between states? Is this distinction important?

2. Compare Kant's normative vision of international society with that of Vattel. Does the League Kant proposes in Perpetual Peace advance Kant's commitment to autonomy? How is this commitment reconciled with his principle of proximity, whereby neighboring groups (even if brought into neighborhood by colonial settlement) are morally required to enter into civil society with each other?

3. Are liberal/democratic states unlikely to fight each other, and generally less bellicose? Should international law have a normative preference for states with liberal/democratic forms of government?
Monday 31 October:

**10. International Law and United States Identity 1776-1914**


[For background to the Monroe Doctrine, see materials on the Holy Alliance [1815] and on British attitudes in the 1820s to intervention by the Holy Alliance against Latin American republics that declared independence from Spain (Ibid, pp. 374-9, 393-7.) ]

The Antelope, 23 U.S. (10 Wheaton) 66 (1825)
The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871)


**Discussion Questions:**

1. To what extent does international law construct identities and interests, rather than simply reflect them? To what extent were problems faced by the US federal government in honoring international commitments a factor in US institutional development in the period before the Civil War? Keohane speculates that global forces will shape the development of the US state in the coming decades more than they shaped the mid-nineteenth transformation (as to which, see Zakaria's discussion). Is Keohane likely to be right? Has he asked the right question?

2. Are the Monroe Doctrine and the Roosevelt Corollary simply political circumstances that international law takes into account, or are they legal ideas (as Carl Schmitt, for example, suggested in building his Grossraumtheorie)? What changes have occurred over time in the way international lawyers have understood these doctrines, and why? How do you understand them?

3. What has been the relation between US law, international law, and US continental and extra-continental expansion? Has a shift from law-taker to law-maker been part of a shift in US identity?
**Monday 7 November:**

11. Liberalism and Positivism in Mainstream International Law

Lassa Oppenheim, The Science and Method of International Law, (1908) 2 American Journal of International Law
Martin Wight, International Theory: The Three Traditions (Gabrielle Wight and Brian Porter eds., 1991), pp. 233-58

**Discussion Questions:**

1. Does Oppenheim offer a theory of international law, or was he ‘merely the humblest scribbler of student manuals’ as Tony Carty put it? Why has the approach and structure of his treatise remained so influential among international lawyers, and why has it appealed to writers on international relations?

2. Is there an ethical case for positivism in international law? Are the arguments for positivist approaches being strengthened or undermined by cross-border integration and the demands of global governance?

3. Doctrines and principles related to ‘the balance of power’ have virtually disappeared from international law texts after Oppenheim. Are they still relevant to international law?

**Monday 14 November (or Monday 21 November):**

12. International Law and Imperialism

Yasuaki Onuma, When was the Law of International Society Born? (2000) 2 Journal of the History of International Law 1
Anne McClintock, Imperial Leather (1995), pp. 219-27
James Lorimer, The Institutes of the Law of Nations, vol. 1 (1883), pp. 93-113

[Note: Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005), is a notable recent book on international law and imperialism. See also recent work by David Armitage, Lauren Benton, Nathaniel Berman, B.S. Chimni, China Mieville, Liliana Obregon, Jennifer Pitts, Gerry Simpson, et al. Eugene Staley's War and the Private Investor (1935), and the various works of C.H. Alexandrowicz, remain valuable.]
Discussion Questions:

1. Should international lawyers accept a Eurocentric history of international law? What can now
be built on such a history?

2. Has imperialism had lasting implications for international law? How does the history of
imperialism in international law shape what can now be done, and strategies for doing it?

Monday 21 November (or Monday 28 November):

13. Is there an International Legal System?

*Please review the articles by David Kennedy and Michael Reisman in the Week 1 materials. In
addition, please read:*

Stanley Hoffmann, International Systems and International Law, in Klaus Knorr ed., The
B.S. Chimni, Marxism and International Law: A Contemporary Analysis, Economic and
Leiden Journal of International Law 271, pp. 278-97
Andrew Linklater, The Transformation of Political Community: Ethical Foundations of the Post-
Westphalian Era (c. 1998), pp. 145-78

Discussion Questions:

1. What does it mean to have a legal system? Are international lawyers rights to believe that
there is, or to wish that there were, an international legal system?

2. What are the conditions under which true international law is possible? Do the hopes for a
new form of international society, suggested for example in Andrew Linklater's writing,
underpin hopes for a new world of international law?

Monday 5 December:

14. What Does it Mean to Be an International Lawyer Now?

Max Weber, The Profession and Vocation of Politics, in Peter Lassman and Ronald Spiers eds,
Philip Allott, Kant or Won't: Theory and Moral Responsibility, (1997) 23 Review of
International Studies pp. 339-57
Liisa Malkki, Citizens of Humanity: Internationalism and the Imagined Community of Nations,
(1994) 3 Diaspora pp. 41-68.
Discussion Questions:

1. How, if at all, do the foundations and determinants of the profession and vocation of international law differ from those of politics?

2. Is the place of ethics and responsibility in what we call ‘international law’ the same as the place of ethics and responsibility in the profession and vocation of being an international lawyer? If not, what are the differences? What place should ethics and moral responsibility have in international law and for international lawyers?

3. Is international society an imagined community? What is the place of law in it? What are the present conditions for, and impacts of, internationalism, and what can we expect or hope them to be in the future?

Tuesday 6 December, 6pm onwards, end of semester Holiday Party!